WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
January 2006

This calendar contains cases that originated in the following counties:

Chippewa
Dane
Door
Jefferson
Kenosha
Milwaukee
Walworth
Washburn
Waukesha

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol.

TUESDAY, JANUARY 10, 2006

9:45 a.m.	03AP2068	State v. Charles W. Mark
10:45 a.m.	04AP1513	Alison M. Welin v. American Family Mutual Ins. Co.
1:30 p.m.	04AP487	Dale Rebernick v. Wausau General Insurance Company

WEDNESDAY, JANUARY 11, 2006

9:45 a.m.	04AP803-CR	State v. John W. Campbell
10:45 a.m.	04AP2232	Village of Cross Plains v. Kristin J. Haanstad
01:30 p.m.	04AP2481-CR	State v. Mark D. Jensen

THURSDAY, JANUARY 12, 2006

9:45 a.m.	04AP1991	Thomas G. Butler v. Advanced Drainage Systems, Inc.
10:45 a.m.	04AP1930-D	Office of Lawyer Regulation v. John F. Scanlan
1:30 p.m.	04AP3382-D	Office of Lawyer Regulation v. Jay Andrew Felli

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. These summaries are not complete analyses of the many issues that each case presents. They are a service of the Director of State Courts Office/Amanda Todd, Court Information Officer 608-264-6256.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 10, 2006
9:45 a.m.

03AP2068 State v. Charles W. Mark

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part and reversed in part a ruling of the Jefferson County Circuit Court, Judge William F. Hue presiding.

This case involves a convicted sex offender whose statements to a parole officer were used against him to help convince a jury that he is a sexual predator in need of long-term treatment. The Supreme Court is expected to determine if an offender's incriminating statements to a parole officer are admissible in a Chapter 980 jury trial.

Here is the background: In 1994, Charles W. Mark was convicted of two counts of first-degree sexual assault of a child and sentenced to eight years in prison.

Mark was paroled in May 1999 after serving five years. His parole was revoked one year later after he admitted to his parole officer that he had walked into a hotel room next to the room in which he was staying and attempted to break down the door of the bathroom, which was occupied by a woman he had been watching.

Shortly before Mark was due for release, the State sought to have him committed as a sexually violent person. A jury trial was held and the State introduced written logs kept by Mark's parole agent. The logs documented conversations in which Mark described the hotel bathroom incident and admitted having molested one of his relatives – activity that formed the basis for one of the original charges against him.

The State also called Mark's current probation agent to testify and to read from these logs. Two psychologists then offered opinions – based in part upon the material reported in the agent's log books – that Mark was a pedophile. The jury agreed and the judge ordered him committed. He appealed.

In the Court of Appeals, Mark argued that his statements to his parole officer were involuntary. He noted that the Rules of Probation/Parole compelled him to give his agent truthful accounts of his actions or be sent back to prison, and that the use of these statements against him in a jury trial was a violation of his constitutional rights.

The Court of Appeals applied caselaw[1] holding that an involuntary statement is admissible in a Chapter 980 proceeding *unless* it is incriminating. The Court then parsed the statements used against Mark, concluded that two of them were incriminating, and directed the circuit court to determine if those statements were compelled, and, if so, whether their admission into evidence was harmless error.

Mark appealed the Court of Appeals holding to the Supreme Court, where he again argues that all of his statements were involuntary and compelled and should not have been used against him in a jury trial. The State does not oppose review, acknowledging that clarity is needed. on the question of whether statements to a parole agent are admissible in a Chapter 980 proceeding. The Supreme Court is expected to provide that clarity.

[1] State v. Zanelli, 223 Wis. 2d 545, 589 N.W.2d 687 (Ct. App. 1998)

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 10, 2006
10:45 a.m.

04AP1513 Alison M. Welin v. American Family Mutual Ins. Co.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a ruling of the Chippewa County Circuit Court, Judge Benjamin D. Proctor presiding.

This is an insurance case that focuses on whether insurers may calculate the amount of 'underinsured motorist' coverage available to a person who is injured in a car crash by taking into account the policy limit of the tortfeasor's (person who caused the accident) regular insurance even if that limit was split among several victims.

Here is the background: Elizabeth Pyrzynski fell asleep at the wheel, crossed the centerline, and crashed into a car driven by Alison Welin. Welin suffered serious and permanent injuries, as did Joshua Opichka, a passenger in Pyrzynski's car. Welin's injuries exceeded $250,000; Opichka's exceeded $50,000.

At the time of the accident, Pyrzynski had an insurance policy with payment limits of $300,000 per person and $300,000 per occurrence. Her insurer paid out the policy limit of $300,000 ($250,000 for Welin and $50,000 for Opichka). Because there were two victims, neither received the policy limit even though the maximum was paid.

Both Welin and Opichka sought to collect under the 'underinsured motorist' provisions of their own policies (in Welin's case, her father's policy). However, the policies contained standard language providing underinsured motorist benefits of up to $300,000 per person and $300,000 per occurrence only if the other motor vehicle met the definition of 'underinsured motor vehicle' – which is a motor vehicle with lower insurance limits than the underinsured motorist limits. Because Pyrzynski's policy limit was $300,000, the same as the underinsured motorist limit in the victims' policies, her vehicle did not meet the definition of underinsured motor vehicle.

Both Welin and Opichka sued, and their cases were consolidated. In both cases, the lower court dismissed their claims after concluding that there was no underinsured motorist coverage available to them, and the Court of Appeals affirmed these decisions.

Now in the Supreme Court, Welin and Opichka argue that they deserve to be fully compensated for their injuries, and that insurers must not be permitted to withhold coverage solely on the basis of the tortfeasor's policy limit without taking into account the fact that this limit may have to be shared between two or more victims.

American Family and the other insurance companies involved in this case argue, on the other hand, that the language of their policies has been upheld in past cases involving multiple claimants and that if the courts stray from the well established law they will create more problems than they solve.

The Supreme Court will determine whether the underinsured motorist limits were properly calculated even though they did not take into account that the liability policy limits were shared between two victims.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 10, 2006
1:30 p.m.

04AP487 Dale Rebernick v. Wausau General Insurance Company

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Daniel A. Noonan presiding.

This case involves a dispute over the amount of information insurers must provide to consumers about available coverage.

Here is the background: In June 2001, Dale Rebernick, a city employee, was cutting the grass with a riding lawnmower on the median strip on Port Washington Road in the City of Glendale. Denelius Heard was driving by when he lost control of his car and struck the mower. Rebernick was thrown off and struck his head on a light pole. He suffered extensive injuries, spent several weeks in a coma, and continues to have debilitating physical and cognitive problems.

The Rebernicks filed a claim against Heard and Heard's insurer, Permanent General. Heard carried the minimum liability insurance, $25,000. The Rebernicks settled with Heard and Permanent, and filed a claim with their own insurer, American Family, which ultimately paid out $100,000.

The Rebernicks carried two policies with American Family. The first was a primary automobile policy. The second was a $1 million umbrella liability policy purchased just a month before the accident. Although insurers are required by law[2] to give customers written notice of the availability of insurance that would cover them in the event of an accident with an underinsured motorist (UIM), American Family did not provide this notice when it sold the Rebernicks the umbrella policy.

On the basis of this lack of notice, the Rebernicks filed a motion seeking to be allowed to reform the policy – essentially, to go back in time and add the UIM coverage. The insurer responded in two ways. First, it argued that since it gave the proper written notice when it sold the automobile policy, it was under no obligation to repeat itself when issuing the additional policy. Second, it argued that the law requiring notice does not apply to umbrella policies. The circuit court agreed that the requirements of the law were satisfied when American Family gave the Rebernicks notice of available UIM coverage during the purchase of the first policy, and that no additional notice was required.

The Rebernicks appealed, and a split Court of Appeals affirmed the trial court.

Now the Rebernicks have come to the Supreme Court, where they argue that the law requires insurers to advise consumers that UIM coverage is available every time a policy that can include such coverage is sold. American Family, on the other hand, submits that the lower courts correctly held that the notice provided was adequate.

The Supreme Court will clarify the notice that insurers must give consumers about available UIM coverage.

[2] Wis. Stat. § 632.32(4m)

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 11, 2006
9:45 a.m.

04AP803-CR State v. John W. Campbell

This is a certification of the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. The case began in Walworth County Circuit Court, Judge Robert J. Kennedy presiding.

This case arises from a custody battle that took a criminal turn when the father absconded with the child. The Supreme Court is expected to decide whether the father should have been permitted – in the course of defending himself in the criminal case – to renew his contention that the mother's original adoption of the child was not legal.

Here is the background: In 1997, Denise James and John Campbell divorced. During the marriage, they had adopted a child, Cody, in Missouri, but moved to Wisconsin before the adoption was final. They finalized the adoption in Missouri by using their lawyer's Missouri address.

In the divorce, Campbell argued that the adoption was not legal because of the residency violation. He claimed that his ex-wife committed two frauds: one by adopting the child through use of the fake residence, and the second by lying about having legal custody during the divorce proceeding. These arguments were unsuccessful; the court concluded that Campbell would have to challenge the adoption in a Missouri court if he chose to do so. James was awarded legal custody of Cody.

After the divorce, Campbell successfully petitioned the court for a separate hearing on the adoption issue; however, before that hearing could occur, Campbell took off for Mexico with Cody.

Joining Campbell in his flight from Wisconsin to Mexico with Cody was a woman named Vickie Prushing, who is Cody's biological mother. The couple fled after Campbell's regular weekend visit with Cody. Six weeks later, Prushing was arrested when she traveled to Texas with Cody. The boy was returned to James. Campbell eventually was arrested in California in 2001.

At trial, Campbell sought to raise the 'fraudulent adoption' issue as a defense. Raising an already litigated issue in a court proceeding that is focused on a different issue is called a collateral attack and is not permitted. The State asked the court to bar Campbell from raising the adoption issue, pointing out that the criminal case was not the place to reopen the family court's custody decision. The court agreed.

A jury found Campbell guilty of interfering with James's custody. He appealed, arguing that he was unfairly barred from presenting a defense, and the Court of Appeals certified this case to the Supreme Court.

The Supreme Court will decide whether Campbell will be given a chance to defend himself against the charge of interfering with custody by raising the 'fraudulent adoption' issue.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 11, 2006
10:45 a.m.

04AP2232 Village of Cross Plains v. Kristin J. Haanstad

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a ruling of the Dane County Circuit Court, Judge Diane M. Nicks presiding.

This case centers on whether an intoxicated person who slides into the driver's seat of a parked and running motor vehicle – but does not drive the vehicle – may be charged with drunk driving.

Here is the background: Shortly after midnight on May 26, 2003, a Village of Cross Plains police officer noticed a car (with headlights on and motor running) and a sport utility vehicle parked in Baer Park, a spot with a history of vandalism. The officer approached the vehicles and found Kristin Haanstad at the wheel of the car and a male companion, Timothy Satterthwaite, in the passenger seat. Another man was in the SUV, waiting for Satterthwaite.

The pair told the officer that they had spent about five hours in a local tavern before traveling to the park in Haanstad's car in order to retrieve Satterthwaite's SUV. They indicated that Satterthwaite had driven the car because Haanstad was intoxicated, and Haanstad had slid over into the driver's seat when Satterthwaite briefly stepped out of the car, but never touched any of the car's controls.

The officer noted that Haanstad appeared drunk and conducted field sobriety tests. He eventually arrested her for operating a motor vehicle while intoxicated (OWI) and she was found guilty in Cross Plains Municipal Court.

Haanstad requested a trial in the circuit court. During the trial, she stipulated that her blood-alcohol content had been .225 but argued that she had committed no crime by sitting in the driver's seat. The trial court agreed, and dismissed the case.

The Village appealed, and the Court of Appeals reinstated the charges, citing caselaw[3] that holds that an intoxicated person who gets behind the wheel of a motor vehicle is considered to be operating that motor vehicle.

Now, Haanstad has come to the Supreme Court, where she argues that there are key differences between her case and the one that the Court of Appeals cited (which involved an intoxicated man who pulled off the highway and fell asleep at the wheel of his running car). She argues that there is no evidence that she ever drove her car on the night in question or even touched the controls. The Village, on the other hand, argues that an intoxicated person at the wheel of a running car is, under the law, operating that car.

The Supreme Court will clarify what constitutes operating a motor vehicle.

[3] County of Milwaukee v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980)

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 11, 2006
1:30 p.m.

04AP2481-CR State v. Mark D. Jensen

This case bypassed the Court of Appeals. It began in Kenosha County Circuit Court, Judge Bruce E. Schroeder presiding.

This case stems from a Kenosha County homicide investigation. The question before the Supreme Court is whether a voice mail message and a letter that the victim left behind, and that implicate the defendant, were properly barred from evidence.

Here is the background: On Dec. 3, 1998, Julie Jensen – a 42-year-old mother of two – was found dead in her Pleasant Prairie home. The cause was poisoning by ethylene glycol (a chemical found in antifreeze).

Shortly before her death, Julie told a next-door neighbor and her son's third-grade teacher that she suspected her husband, Mark Jensen, was trying to poison her. She left a letter with the neighbor and instructed that it be given to the police in the event of her death. The letter, which Julie signed, revealed Julie's suspicions about Mark and contained a photograph of a list that she had found in her husband's daily planner. "I don't know what it means," she wrote, "but if anything happens to me, he would be my first suspect."

Mark was arrested and charged with first-degree intentional homicide. The admissibility of Julie's letter and her statements to various people became an issue. The court ultimately ruled that some of Julie's oral statements would be admitted but that a voice mail message that she left for a police officer and the letter that was delivered following her death were inadmissible.

The trial court's decision to bar this evidence was based upon a decision of the U.S. Supreme Court in a Washington state case called Crawford v. Washington[4]. That case, like this one, involved a question of the admissibility of a recorded statement from a victim. The Supreme Court held that a defendant's Sixth Amendment right to confront his/her accusers is violated by the admission of this type of testimony (called testimonial evidence). That case, however, did not provide a clear definition of what constitutes testimonial evidence and – according to documents filed in the Wisconsin Supreme Court – widespread confusion and uncertainty have resulted in state trial courts.

The decision of the trial court to admit certain statements and bar others sent both the prosecution and the defense to appellate courts. The State asked the Supreme Court to permit this case to bypass the Court of Appeals, and the Supreme Court granted the petition.

The Supreme Court is expected to clarify what constitutes testimonial evidence.

[4] Crawford v. Washington, 124 S. Ct. 1354

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 12, 2006
9:45 a.m.

04AP1991 Thomas G. Butler v. Advanced Drainage Systems, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a ruling of the Washburn County Circuit Court, Judge Norman L. Yackel presiding.

This case involves a problem-plagued project to lower the level of a lake, and a resulting lawsuit by lakeshore property owners. The lawsuit was dismissed in the lower courts and the homeowners hope to persuade the Supreme Court to reinstate it.

Here is the background: Shell Lake is Wisconsin's largest land-locked lake. For many years, its levels have been rising. Approximately one-third of the 380 residences along its shores have experienced flooding problems.

Over the years, the City of Shell Lake explored ways to lower the lake level and eventually worked with the Department of Natural Resources to develop a plan to divert water to Yellow River, approximately 4.4 miles away.

Engineering and construction firms installed the system – essentially a network of pipelines, monitoring equipment, and flow controls – in 2002. The pipeline did not work. It was plagued with leaks, ill-fitting gaskets, and joints that were not lubricated properly. An engineering study pointed to numerous causes, from pipe material that was not sturdy enough, to manufacturing defects, to questionable installation techniques, to design flaws such as a lack of manholes, which precluded testing of the pipeline. Eventually, the city decided to "slipline" the existing pipe (install a new pipeline inside of it) and began operating the new system in November 2003.

After the flaws in the first system were revealed, a group of lakeside property owners sued ECG, Inc. (the design/engineering firm), Advanced Drainage Systems, Inc. (the pipe supplier), and Thompson Sand & Gravel (the general contractor). The homeowners alleged that the defendants were negligent. The defendants asked the circuit court to dismiss the claim because (1) permitting a lawsuit based upon a failure to control a naturally occurring problem would not be good public policy, and (2) the defendants had a contract with the City of Shell Lake – not the property owners.

The circuit agreed with both of these arguments and dismissed the claim. The homeowners appealed, and the Court of Appeals' analysis of the case centered on whether the defendants owed a duty to the homeowners even though those homeowners were third parties (that is, they did not contract directly for these services). At issue was whether the following legal tenet, sometimes called the Good Samaritan Law, applies:

Restatement (Second) of Torts § 324A (1965):
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

1. His failure to exercise reasonable care increases the risk of such harm, or
2. He has undertaken to perform a duty owed by the other to the third person, or
3. The harm is suffered because of reliance of the other or the third person upon the undertaking.

The Court of Appeals concluded that this law does not apply, rejecting as unreasonable the homeowners' argument that the engineering/design/construction firms owed a duty to the homeowners. The Court of Appeals further noted that the homeowners had not proven that the failed pipeline caused them more harm than they would have suffered had the project not been undertaken.

In the Supreme Court, the homeowners warn that the Court of Appeals decision goes too far, giving broad immunity to government contractors who are hired to do work that is designed to improve safety or protect property. An article in the *Wisconsin Law Journal*[5] explores how this immunity might work under different fact patterns:

> Suppose a city contracts with a private contractor to remove snow from the streets and spread salt. The job is negligently performed, and an automobile crash results. An injured citizen sues the contractor, and the contractor seeks summary judgment, claiming it owed no duty of care under the Good Samaritan Doctrine.

The defendants' filings in the Supreme Court support the conclusions reached by both lower courts. The defendants argue that negligent performance of a contract does not always create a right to sue, and that there is already ample caselaw providing guidance on when and how the Good Samaritan Law applies.

The Supreme Court will decide whether the homeowners may reinstate their lawsuit.

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[5] Ziemer, David. "Good Samaritans Case Analysis." (Milwaukee: *Wisconsin Law Journal*, May 4, 2005)

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 12, 2006
10:45 a.m.

04AP1930-D Office of Lawyer Regulation v. John F. Scanlan

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case practiced law in Chicago.

This case involves Atty. John Francis Scanlan, a 1992 graduate of a Chicago law school who was admitted into the practice of law in Wisconsin in 1997. The charges contained in the complaint against him refer to incidents that occurred in 2000 and 2002 when he ran a solo law practice in Door County. He has since relocated to Illinois.

Here is the background: In July 2004, the Office of Lawyer Regulation (OLR) charged Scanlan with 22 counts of misconduct related to his handling of matters for nine clients. OLR then dropped one count and the referee who heard the matter dismissed four others after concluding that OLR had not met its burden of proof. There are now 17 misconduct counts pending against Scanlan, although the Court could reverse the referee and reinstate the four that he dismissed.

Six of the counts that the referee found to be viable involve two family law matters – one a divorce and one a child custody issue – in which clients retained Scanlan and he mishandled their money. Four additional counts – these related to his representation of a Door County vacation resort – also involve poor recordkeeping and mishandling of payments. Three counts arise from a lack of communication between Scanlan and frustrated clients, another three counts arise from his practicing law when his license was suspended (for neglecting to pay his bar dues), and the final count involves a case where Scanlan allowed a case to proceed to court without determining if his client had a viable defense.

The Office of Lawyer Regulation (OLR) is seeking a two-year suspension of Scanlan's Wisconsin law license. The referee concluded that this penalty was too harsh, given the mitigating circumstances, which include the fact that Scanlan does not currently practice law in Wisconsin and is therefore not a threat to Wisconsin residents, that he has shown deep remorse, and that, according to medical testimony, he was suffering from several mental illnesses during the time in question.

The referee recommended a 180-day suspension. The Supreme Court will decide what is appropriate.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 12, 2006
1:30 p.m.

04AP3382-D Office of Lawyer Regulation v. Jay Felli

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case practices law in Brookfield.

Atty. Jay Andrew Felli, a 1992 graduate of an Ohio law school, has been licensed to practice law in Wisconsin since 1994.

Here is the background: the Office of Lawyer Regulation (OLR) has charged Felli with 15 counts of misconduct related to three clients. The referee who heard the case dismissed three of the counts, although the Court could reverse the referee and reinstate those. All three cases involved estate planning.

In the first case, involving an elderly Milwaukee woman who died in 1998, Felli allegedly billed the woman's trust more than $100,000 in legal fees during a 14-month period. He also prepared trust documents that named himself as a co-trustee of her trust, and prepared amendments to the trust that removed the original beneficiaries and replaced them with a piano school owned by Felli's wife's cousin.

The second case involved a blind woman who hired Felli to prepare her will. Again, OLR alleges, Felli had the woman name him as trustee and then paid himself about $7,000 without providing services to earn this money. OLR further alleges that Felli failed to advise the woman of the risks inherent in creating a charitable remainder trust with respect to her eligibility for benefits.

The third case involved an 87-year-old woman who hired Felli to prepare estate-planning documents. OLR alleges that Felli appointed himself to various fiduciary positions for the client, gave himself power of attorney for the woman's financial and health care decisions, and used the power of attorney to change the primary beneficiary of the trust to himself.

The referee noted that he initially saw this as a case for revocation, but then concluded that a suspension might better encourage Felli to make himself accountable to the "still-unknown number of clients" for which he may be managing assets. The referee has recommended an 18-month suspension.

In the Supreme Court, Felli asserts that his conduct was above-board, and that issues of when and how an attorney may talk to a client about serving as a trustee occupy an ethical gray area. He suggests that a public reprimand or short suspension is all that these allegations warrant. The Supreme Court will decide what is appropriate.